U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12269468

Date: JULY 14, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner, an entrepreneur, seeks second preference immigrant classification as an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not establish that he is an individual of exceptional ability. The Director also concluded that the Petitioner did not establish that a waiver of the required job offer, and thus of the labor certification, would be in the national interest.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. LAW

To establish eligibility for a national interest waiver, a petitioner must first demonstrate qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability in the sciences arts or business. Because this classification requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest.

Section 203(b) of the Act sets out this sequential framework:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –
>
> > (A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national

economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of job offer –

(i) National interest waiver. . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

For the purpose of determining eligibility under section 203(b)(2)(A) of the Act, "exceptional ability" is defined as "a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." 8 C.F.R. § 204.5(k)(2). The regulations further provide six criteria, at least three of which must be satisfied, for an individual to establish exceptional ability:

(A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;

(B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;

(C) A license to practice the profession or certification for a particular profession or occupation;

(D) Evidence that the alien has commanded a salary, or other renumeration [*sic*] for services, which demonstrates exceptional ability;

(E) Evidence of membership in professional associations; or

(F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

8 C.F.R. § 204.5(k)(3)(ii).

In determining whether an individual has exceptional ability under section 203(b)(2)(A) of the Act, the possession of a degree, diploma, certificate, or similar award from a college, university, school or other institution of learning or a license to practice or certification for a particular profession or occupation shall not by itself be considered sufficient evidence of such exceptional ability. Section 203(b)(2)(C) of the Act.

Where a petitioner meets these initial evidence requirements, we then consider the totality of the material provided in a final merits determination and assess whether the record shows sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination); *see also Visinscaia v. Beers*, 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013); *Rijal v. USCIS*, 772 F. Supp. 2d 1339 (W.D. Wash. 2011). This two-step analysis is consistent with our holding that the "truth is to be determined not by the quantity of evidence alone but by its quality," as well as the principle that we examine "each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true." *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

II. ANALYSIS

The Director found that the Petitioner did not establish he is an individual of exceptional ability. The Petitioner does not assert that he qualifies for second-preference employment as a member of the professions holding an advanced degree. If the Petitioner does not establish eligibility as an individual of exceptional ability, we need not determine whether a waiver of the job offer requirement, and thus of a labor certification, would be in the national interest. *See* section 203(b)(2) of the Act. For the reasons discussed below, the Petitioner did not establish that he is an individual of exceptional ability.

The Director concluded that the Petitioner satisfied the criteria at 8 C.F.R. § 204.5(k)(3)(ii)(B), but the Director found that the Petitioner did not satisfy at least two of the five remaining criteria. Both in support of the petition and in response to the Director's request for evidence (RFE), the Petitioner addressed only the criteria at 8 C.F.R. §§ 204.5(k)(3)(ii)(B), (D), and (F), and did not assert eligibility under the criteria at 8 C.F.R. §§ 204.5(k)(3)(ii)(A), (C), and (E). Likewise, on appeal, the Petitioner asserts eligibility under only 8 C.F.R. §§ 204.5(k)(3)(ii)(B), (D), and (F).

The criterion at 8 C.F.R. § 204.5(k)(3)(ii)(D) requires "[e]vidence that the alien has commanded a salary, or other renumeration [*sic*] for services, which demonstrates exceptional ability." On appeal, the Petitioner asserts that an individual income tax return for calendar year 2016 "shows the various incomes (remuneration) from the companies Petitioner has founded (in Brazilian Reais [*sic*], second column as of filing those returns)." The Petitioner summarizes that, "[j]ust from these alone, the total earned as an entrepreneur was R$2,093,708.47, or monthly (using 13 months as is common in Brazil), R$163,054.50." The Petitioner further asserts that his "monthly remuneration from just the three entrepreneurial ventures listed is several orders of magnitude higher than the highest master's level salary listed of R$17,043. In fact, it is nearly ten times higher."

The Petitioner's assertions regarding the probative value of the tax return are misplaced. The tax return does not establish what services the Petitioner may have provided in exchange for which he received the shares of stock—or even when the Petitioner acquired them—in order to establish indicia of exceptional ability. *See* 8 C.F.R. § 204.5(k)(3)(ii)(D). Moreover, the tax return specifically itemizes the referenced shares of capital stock and corporate interest in various companies as assets

held, not income earned, during that calendar year.[1] We note that the value of the shares of stock held remained constant from "12/31/2015" to "12/31/2016," which does not indicate that the Petitioner received any additional value from holding the stock during that calendar year. Because the Petitioner already held those assets at that value at the end of the prior year, the record does not support the Petitioner's characterization of the value of shares of stock during that period as part of "the total earned as an entrepreneur" during that period. Additionally, the corporate interest the Petitioner included in the R$2,093,708.47 figure, in the amount of R$163,208.47, is equal to the value of the Petitioner's declared capital contribution of $50,079.31 in that company during the period, which indicates a net zero return on investment at that time.[2] Without more, holding various assets at a constant value and providing a capital investment with no return are not evidence of exceptional ability.

In contrast, the tax return indicates the Petitioner declared a total income of R$49,828.06 during calendar year 2016, or R$3,832.93 per month over a 13-month period, as the Petitioner asserts is common in Brazil. That amount is below the "junior" level salary for a "small organization," as indicated in the Salary Survey in Brazil for Entrepreneurs, submitted by the Petitioner in response to the Director's RFE, not "nearly ten times higher . . . than the highest master's level salary" among all organization sizes, as the Petitioner asserts.[3] On appeal, the Petitioner does not address any other evidence that may establish eligibility under this criterion. In summation, the record does not establish evidence that the Petitioner commanded a salary, or other remuneration *for services*, which demonstrates exceptional ability, as required by 8 C.F.R. § 204.5(k)(3)(ii)(D).

The only other remaining criterion under which the Petitioner asserts eligibility on appeal is 8 C.F.R. § 204.5(k)(3)(ii)(F), which requires "[e]vidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations." Although the Petitioner asserts on appeal that "numerous reference letters prepared and submitted is the recognition . . . from peers" required by 8 C.F.R. § 204.5(k)(3)(ii)(F), he discusses only one letter, submitted in response to the Director's RFE, from his former business partner from 2004 to 2012. This letter is the only evidence that, in response to the RFE, the Petitioner asserted established eligibility under 8 C.F.R. § 204.5(k)(3)(ii)(F).

The letter describes how the Petitioner "gave several training sessions on the use of our systems, providing [o]n the [j]ob training in the [client] companies." The letter also notes that the director of [redacted] selected the Petitioner to be the "bridge between [redacted] and [redacted] [*sic*] because he had the knowledge of the system and its installation and operation." The letter opines

[1] We acknowledge that an individual may receive an asset, such as a share of stock, as remuneration in exchange for services rendered. However, as noted, the tax return does not elaborate on how, and why, the Petitioner acquired the shares of stock. We note that, to the extent that assets held during 2016—but acquired during an earlier period—may be a form of income or other remuneration, the value of the Petitioner's total assets held decreased from R$4,142,194.18 as of "12/31/2015" to R$4,141,794.80 as of "12/31/2016," indicating a net annual loss in total asset value.

[2] The itemization in the income tax return states that the "value of dollar as of 12/31/2016 [is] R$3,259." Investing capital in exchange for an equal value of corporate interest is not income or other remuneration; rather, it simply transfers the form of asset held.

[3] We note that the salary survey is for the period of "01/31/2019 to 01/31/20" but the income tax return is for the 2016 calendar year. The record also contains a similar salary survey, albeit for the period of "05/21/2017 to 05/21/2018," which again does not address the 2016 calendar year. The R$3,832.93 figure also is below the "junior" level salary for a "small organization" during that 2017-18 period.

that the Petitioner's role "in the assembly of the first [redacted] systems installed inside the [redacted] [*sic*] plant in the city of [redacted]. . . was of great importance and recognition for our company, because who represents [redacted] manufactures and name are only for large and renowned companies."

The letter does not establish how the Petitioner's entrepreneurship accomplished achievements and significant contributions *to the industry or field*, as required by 8 C.F.R. § 204.5(k)(3)(ii)(F). Instead, the letter specifically states that the Petitioner's ability to train clients "was of great importance and recognition for our company," not for the industry or field. Moreover, the Petitioner does not identify on appeal any other letter from a peer, governmental entity, or professional or business organization, to corroborate the assertions made by the Petitioner's former business partner and to establish that more than one peer recognizes the Petitioner's achievements and contributions. For the foregoing reasons, the record does not establish that the Petitioner has received recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations, as required by 8 C.F.R. § 204.5(k)(3)(ii)(F).

In summation, the Petitioner has not satisfied at least three of the six criteria at 8 C.F.R. § 204.5(k)(3)(ii), and therefore has not established he is an individual of exceptional ability. Because the Petitioner did not establish eligibility as an individual of exceptional ability, we need not address the Petitioner's assertions on appeal regarding whether a waiver of the job offer requirement, and thus of a labor certification, would be in the national interest. *See* section 203(b)(2) of the Act.

III. CONCLUSION

As the Petitioner has not satisfied at least three of the six criteria at 8 C.F.R. § 204.5(k)(3)(ii), we conclude that the Petitioner has not established that he is an individual of exceptional ability.

ORDER: The appeal is dismissed.